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In the Supreme Court of the United States

October Term, 1977

No. 77-382

FRANK BEAL, SECRETARY, DEPARTMENT OF PUBLIC WELFARE, COMMONWEALTH OF PENNSYLVANIA, et al.,

Petitioners

v.

ELVIRA VECCHIONE, et al.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Frank Beal, et al., Petitioners, hereby petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which was entered in this case on June 14, 1977.

I. OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is set out at 139a-160a. The District Court's opinion is reported at 426 F. Supp. 1297, and is set out at 97a-138a.

II. JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1977, and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

III. QUESTIONS PRESENTED

This petition raises the questions of whether an order requiring the state defendants to refund millions of dollars wrongfully collected and deposited in the Commonwealth's treasury violates the Eleventh Amendment to the Constitution of the United States. If that order is found to be unconstitutional, then the question of whether Pennsylvania has waived her immunity arises. The Court of Appeals in the first instance found that the Eleventh Amendment was not a bar to the District Court's order. That Court also went on to hold that, even if the Eleventh Amendment did apply, it had been waived by Pennsylvania's failure to appeal from the order. Therefore, the following questions are presented by this petition:

1. Whether the award of restitution in this case violated the Eleventh Amendment to the Constitution?

2. Whether Pennsylvania by moving to vacate that order in timely fashion, rather than appealing, has waived its Eleventh Amendment immunity?

IV. STATEMENT OF THE CASE

Respondents, recipients of OASDI Social Security benefits, commenced this civil rights action in January 1973. They challenged the constitutionality of two sections of Pennsylvania's Mental Health and Mental Retardation Act which allowed Commonwealth officials to apply for and receive federal benefits for patients residing in Pennsylvania mental health and retardation facilities.[1] In the main, they claimed a due process right to a judicial determination of incompetence before the Petitioners could apply for, and receive, these benefits on Respondents' behalf. They also contended that this statutory scheme violated the equal protection clause in that Respondents were not provided the various procedural protections that, under Pennsylvania law, were provided to others.

Because Respondents sought injunctive relief from the operation of these statutes, a three-judge court was convened. On June 11, 1974, that court enjoined the continued implementation of those statutes, finding that they were unconstitutional on due process and equal protection grounds (68a-69a).

On March 13, 1975, the Respondents moved for a finding of contempt, asserting that Petitioners continued

[1] Mental Health and Mental Retardation Act of 1966, 50 Pa. Stat. Ann. §4401 et seq. The sections which were challenged by Respondents have been set out in full at 161a.

to assess patients for care and maintenance costs in violation of the injunction. That motion was settled by the entry of a subsequent order, with the consent of counsel, which, inter alia, required the restitution of approximately $9 million to thousands of residents of Pennsylvania's mental facilities.

On February 18, 1976, the Petitioners moved to vacate the restitution aspects of that subsequent order on Eleventh Amendment grounds.[2] The District Court refused to vacate the order and was affirmed in this respect by the Court of Appeals (159a-160a). Petitioners therefore seek review of the Appeals Court's decision.

[2] That order was entered on April 4, 1975 and is set out at 77a.

V. REASONS FOR GRANTING THE WRIT

A. The Lower Court's Holding That the Eleventh Amendment Is Not Applicable in This Case Is Erroneous and Contrary to This Court's Ruling in Edelman v. Jordan

For approximately nine months after the entry of the original injunction in this matter the Petitioners continued to act as representative payees for thousands of mental patients receiving federal benefits. In that capacity they continued to apply certain portions of these funds toward the cost of the patients' care and maintenance at the various facilities.[3] As a result, the District Court ordered restitution with interest (77a-79a).

In refusing to vacate this award on Eleventh Amendment grounds, both the District Court and the Court of

[3] Federal law defines the responsibilities of representative payees and places the highest priority on payment of a patient's care and maintenance expenses. 42 U.S.C. §405(j), 20 C.F.R. §404.1601 et seq. These funds, however, were collected by Pennsylvania revenue agents subsequent to the July 11 order, and in apparent violation of that order. The funds, of course, served to partially offset the costs of a patient's care and maintenance. 72 Pa. Stat. Ann. §206. Furthermore, state law requires that

> "[a]ll moneys received by the Department of Revenue during any day shall be transmitted promptly to the Treasury Department . . ." 72 Pa. Stat. Ann. §209.

Thus, the funds so collected were promptly deposited with Pennsylvania's Treasury.

Appeals ignored the teaching of this Court in *Edelman v. Jordan*, 415 U.S. 65 (1975). In *Edelman* this Court noted the earmarks of an unconstitutional award against a state. First, such an award ". . . to a virtual certainty [must be] paid from state funds, and not from the pockets of the individual state officials who were defendants in the action." *Id.* at 668. Next, the amount of the award is ". . . measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state official." *Ibid.*

There can be no serious doubt that both of these characteristics are present here. First, the Court of Appeals conceded that the order could not be complied with ". . . unless the Commonwealth fiscal authorities cooperated . . ." (156a). In short, the award could only be paid from the state treasury. Secondly, the order specifically measured the payback as ". . . all such amounts withheld . . . including interest earned" (78a-79a).

The lower Court ignored these obvious and critical similarities to the decree which was set aside in *Edelman*. Rather, the Court of Appeals chose to extend the *Ex Parte Young*[4] fiction beyond all precedent, noting simply that "[w]here the money came from to comply with the restitution ordered in paragraph 4 of the order was [petitioners'] problem, not the court's" (150a-151a). If the *Ex Parte Young* doctrine is to be extended to the point that a multi-million dollar award against a state's treasury can be entered by a federal court, notwithstanding the clear limitations of that doctrine in *Edelman*, then such an extension should come from this Court. See *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945); *Jagnan-*

[4] 209 U.S. 123 (1908).

dan v. Giles, 538 F.2d 1166 (5th Cir., 1976); *McAuliffe v. Carlson,* 386 F. Supp. 1245 (D. Conn., 1975), *rev'd on other grounds,* 540 F.2d 305 (2d Cir., 1976), *cert. den.* 96 S.Ct. 3199 (1976).

B. The Court of Appeals' Ruling That Pennsylvania Had Waived Its Eleventh Amendment Immunity Directly Conflicts With the Holding of the Court of Appeals for the Sixth Circuit in Jordan v. Gilligan [5]

The District Court's order requiring restitution of approximately $9 million was never appealed. However, when it was discovered that its terms violated the Commonwealth's Eleventh Amendment immunity, the Petitioners moved, in timely fashion, to vacate the order pursuant to F.R.C.P. 60(b).[6] The Court of Appeals affirmed the District Court's denial of that motion, concluding that Pennsylvania had waived its immunity by not appealing from the original order.

That decision by the Court of Appeals has created a direct split among the circuits on this issue. In a strikingly similar case, the Court of Appeals for the Sixth Circuit has concluded that, like other jurisdictional questions,[7] the Eleventh Amendment may be raised by a motion to vacate a final judgment pursuant to F.R.C.P. 60(b). *Jordan v. Gilligan,* supra. In *Jordan,* the Court of Appeals was presented with an appeal from a denial of a motion to vacate a judgment awarding attorney's fees against the State of Ohio. Ohio, like Petitioners in this case, asserted that the award was void since it violated the Eleventh Amendment and that, therefore, the District Court had been without jurisdiction to enter it. Similarly, the District Court in *Jordan* had denied the motion because the State of Ohio failed to object to the award until after the judgment became final. *Id.* at 710.

However, the Sixth Circuit reversed, ruling that ". . . once it is determined that a state is not subject to federal jurisdiction because of the operation of the Eleventh Amendment, a court must vacate any judgment entered in excess of its jurisdiction." *Ibid.*

In this case the lower Court expressly disagreed. Contrary to the Sixth Circuit, the Third Circuit concluded that an order which exceeds a Court's jurisdiction under the Eleventh Amendment is not void and can only be challenged by appeal. In this regard the lower Court acknowledged that ". . . we disagree with the holding in *Jordan v. Gilligan,* 500 F.2d 701 (6th Cir., 1974), that a claim of sovereign immunity can be raised by a Rule 60 (b) (4) motion at any time." (157a).

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[5] 500 F.2d 701 (6th Cir., 1974), *cert. den.* 421 U.S. 991 (1975).

[6] In Pennsylvania only the Legislature can waive the Commonwealth's immunity. *Freach v. Commonwealth of Pennsylvania,* —— Pa. ——, 370 A.2d 1163 (1977); *Collins v. Commonwealth of Pennsylvania,* 262 Pa. 572, 106 A.2d 229 (1919); *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459 (1945); *Sosna v. Iowa,* 419 U.S. 393, 396, n.2 (1975).

[7] E.g., *Veek v. Commodity Enterprises, Inc.,* 487 F.2d 423 (9th Cir., 1973); *In re Penco Corp.,* 465 F.2d 693 (4th Cir., 1972); *Misco-Leasing, Inc. v. Vaughn,* 450 F.2d 257 (10th Cir., 1971); *Sagers v. Yellow Freight Systems, Inc.,* 68 F.R.D. 686 (N.D. Ga. 1975); *Sonus v. Matsushita Electric Industrial Co. Ltd.,* 61 F.R.D. 644 (D. Mass., 1974); *U.S. v. Melichor,* 56 F.R.D. 49 (E.D. Wisc., 1972).

The split between the circuits on this important issue is obvious. It is a question of great importance to the Commonwealth of Pennsylvania, as well as to all other states, as they are continually confronted with attacks, both direct and indirect, upon their public fisc by private litigants.

VI. CONCLUSION

For the foregoing reasons Petitioners respectfully request that this Court grant the petition for writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

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